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In The
Supreme Court of the United States

MARK MARTIN,

Petitioner,

v.

CITY OF OCEANSIDE, SHAWN KELLY, and BENJAMIN EKELAND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a person answer when the police come knocking on the door to his or her home?

2. Can police enter a home without a warrant and without exigent circumstances under the "emergency doctrine" of the "community caretaking" exception to the warrant requirement of the Fourth Amendment?

3. Is the failure of police to announce their purpose a factor to be considered in determining the reasonableness of their breaking and entering into a home when dispatched merely to "check the welfare" of an adult living there?

4. Did the United States Court of Appeals for the Ninth Circuit and the United States District Court err in finding qualified immunity by imparting knowledge to the police officers who conducted the search, contravening all evidence adduced in support of and in opposition to the Motion for Summary Judgment in United States District Court?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Mark Martin, petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit from its published opinion filed March 11, 2004, affirming the summary adjudication by the United States District Court in favor of respondents.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed its published opinion on March 11, 2004. This appears in Appendix A to this petition at Page 1.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its published opinion on March 11, 2004. This appears in Appendix A to this petition at Page 1. Jurisdiction to review by Certiorari a decision of a United States Circuit Court is provided under 28 U.S.C. § 1254(1).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mark Martin lived in a large, single family home in an upper-middle class development in the City of Oceanside California. He rented out one of the rooms to an adult woman named Traci Trotman. Ms. Trotman's father had left several unreturned telephone messages for her. Dr. Trotman became concerned and telephoned the Oceanside Police Department, and asked that they check on his daughter. Dr. Trotman, by his declaration, expressed concern for his daughter's safety. However, the police officers dispatched to "check the welfare" of Ms. Trotman were unaware of the father's concern for her safety.

The first officer on the scene knocked on the door repeatedly and loudly, but never announced the purpose of his visit. He entered the back yard of the home by opening

a latched gate and circled the entire house. He found nothing amiss and did not hear anything unusual coming from the home. Two cars were parked in the driveway, one matching a description of Ms. Trotman's car. The officer found a side garage door that was closed, but unlocked. He stealthily entered the garage and tested the door from the garage into the main house. It, too, was closed but unlocked. The officer then exited the building and called for backup. While waiting, the officer spoke to a neighbor who said that she had seen Ms. Trotman a few days earlier, and believed that she should be home.

When the backup arrived, the officers determined that someone was home, but that the person or persons inside did not want to answer the door.

Mr. Martin and Ms. Trotman could see the officers from Ms. Trotman's bedroom window. However, the officers did not announce that they were there to contact Ms. Trotman, so she and Mr. Martin surmised that Mr. Martin's ex-wife had called the police and made a false accusation against him. Mr. Martin had gone through a bitter five-year divorce and his ex-wife had harassed Mr. Martin with false calls to the police in the past. Concerned, Mr. Martin called his divorce lawyer and asked if he had to respond to this intrusion. The attorney told Mr. Martin that he had a right not to respond under the Fourth Amendment.

The police then entered the main living area of the home, passing through the side-yard gate, the side door of the garage, and then through the closed, but unlocked, door from the garage into the main living area. They quietly moved around the first floor of the house for a short time, and then found Ms. Trotman and Mr. Martin

on the second floor. The officers did not announce themselves, and they did not announce their purpose while in the home prior to confronting Ms. Trotman and Mr. Martin at gunpoint.

The United States District Court summarily adjudicated the issue of qualified immunity on Mr. Martin's 42 U.S.C. § 1983 claims in defendants' favor. The District Court found, under *Saucier v. Katz*, 533 U.S. 194 (2001), that a constitutional violation had been alleged, but that the law was ambiguous enough that a reasonable police officer might have made a mistake. The United States Court of Appeals for the Ninth Circuit affirmed, but did so by holding that no constitutional violation had occurred in light of the emergency aid doctrine of the community caretaking exception to the warrant requirement of the Fourth Amendment.

The courts below erred, it is respectfully submitted, in the following ways:

(a.) In its published opinion, reproduced at App. 1, the Ninth Circuit establishes the unprecedented and unconstitutional duty to answer the door of a home when police come knocking. "Martin had ample opportunity to learn their purpose, and he ignored it. He and he alone is responsible for the officer's entry after he chose to play hide-and-go-seek with the authorities. . . . Had Martin simply responded, as a normal citizen, to the knock on his door, none of the events about which he complains would have ever happened." (App. 10.)

(b.) The Court of Appeals extends the community caretaking exception and the emergency aid doctrine to a person's home, contravening the mandate of this

Honorable Court in *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

(c.) The Ninth Circuit dismisses the holding of *Wilson v. Arkansas*, 514 U.S. 927, 930, (1995) by finding that the undisputed failure of the officers to announce the purpose of their visit does not factor into the reasonableness inquiry.

(d.) Both the Court of Appeals and the U.S. District Court imparted to the officers knowledge of the content of telephone call from Dr. Trotman which is unsupported by any evidence and is, in fact, contradicted by the audio/video recording of the officers while in Mr. Martin's home.

The published opinion of the Ninth Circuit Court of Appeals should not be permitted to contravene the mandates of this Honorable Court.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

1. To resolve whether a person has to answer the door to their home when police come knocking.

2. To resolve whether police may enter a persons home without exigent circumstances, based on the "emergency aid" doctrine of the "community caretaking" exception to the warrant requirement.

3. To resolve whether the failure of police to announce their purpose on a "check the welfare call" is a factor to be considered when inquiring into the reasonableness of a search.

4. To resolve whether both the Ninth Circuit Court of Appeals and the U.S. District Court imparted

knowledge to the officers without any supporting evidence, and in contradiction to the powerful video tape evidence otherwise.

ARGUMENT I

THE NINTH CIRCUIT CREATES A NEW, EXTRA-CONSTITUTIONAL OBLIGATION OF PERSONS TO ANSWER THE DOOR TO THEIR HOME WHEN THE POLICE COME KNOCKING, OVERTURNING ANCIENT AND ENDURING PRINCIPLES OF ANGLO-AMERICAN LAW

The principle that a person can retreat into their home, unmolested by the government lies at the heart of Fourth Amendment freedoms.

> 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!' *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting remarks attributed to William Pitt).

The U.S. Ninth Circuit has sown an unwholesome and dangerous seed by placing the obligation on Mr. Martin to answer his door when the police knock.

> "Martin had ample opportunity to learn their purpose, and he ignored it. He and he alone is responsible for the officer's entry after he chose to play hide-and-go-seek with the authorities. . . . Had Martin simply responded, as a normal citizen, to the knock on his door, none of the events

> about which he complains would have ever happened." (App. 10.)

The framers of the Constitutions warned against the subtle degradation of our liberties: "There are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations." James Madison, Speech to the Virginia Ratifying Convention, June 16, 1788.

Certiorari should therefore be granted in this case to uproot this new threat to Fourth Amendment freedoms.

ARGUMENT II

THE NINTH CIRCUIT HAS NOW EXTENDED THE "EMERGENCY AID" DOCTRINE OF THE "COMMUNITY CARETAKING" EXCEPTION TO THE WARRANT REQUIREMENT TO THE HOME ITSELF

The term "community caretaking" may be traced to *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). *E.g.*, *United States v. Tibolt*, 72 F.3d 965, 969 (1st Cir. 1995), fn. 2.

> Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which

> there is no claim of criminal liability and engage in **what, for want of a better term, may be described as community caretaking functions**, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Cady v. Dombrowski, supra,* 413 U.S. at 441, emphasis supplied.

The Ninth Circuit Court of Appeals had previously held that whatever exception to the warrant requirement is created by the "community caretaking" functions referred to in *Cady,* it is limited to automobiles and does not apply to homes. *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993). And that interpretation is, indeed, compelled by the context in which this Honorable Court made reference to "community caretaking."

> The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. *Id.* at 447-48.

Moreover, this Honorable Court has since repeatedly emphasized the tie between *Cady's* "community caretaking" and the automobile. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987), *California v. Carney*, 471 U.S. 386, 390-92 (1985), *South Dakota v. Opperman*, 428 U.S. 364, 367, 368 (1976).

To breach the threshold of a home has always required exigent circumstances. *Payton v. New York*, 445 U.S. 573,

589-90 (1980). The facts available to the officer who entered Mr. Martin's home could not give rise to a reasonable belief that there was any exigency to justify entry into the home.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." [Citations.] In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

Certiorari should therefore be granted to preserve the exigent circumstances standard for entry into a home.

ARGUMENT III

THE NINTH CIRCUIT DISMISSED THE UNDISPUTED FAILURE OF THE POLICE TO ANNOUNCE THEIR PURPOSE AS A FACTOR IN DETERMINING THE REASONABLENESS OF THE SEARCH IN VIOLATION OF *WILSON v. ARKANSAS*, 514 U.S. 927 (1995).

Every police officer knows that the Fourth Amendment requires "knock and notice." *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995). And there is no assertion of any law enforcement interests in this case that can justify an exception to the "knock and notice" requirements.

> Several prominent founding-era commentators agreed on this basic principle. According to Sir Matthew Hale, the "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if **after acquainting them of the business**, and demanding the prisoner, he refuses to open the door." See 1 M. Hale, Pleas of the Crown *582. William Hawkins propounded a similar principle: "the law doth never allow" an officer to break open the door of a dwelling "but in cases of necessity," that is, unless he "**first signify to those in the house the cause of his coming**, and request them to give him admittance." 2 W. Hawkins, Pleas of the Crown, ch. 14, § 1, p. 138 (6th ed. 1787). Sir William Blackstone stated simply that the sheriff may "justify breaking open doors, if the possession be not quietly delivered." 3 Blackstone *412.
>
> The common-law knock and announce principle was woven quickly into the fabric of early American law. *Wilson* at 932-933 (emphasis added).

California Penal Code § 1531 reads:

> OFFICER MAY BREAK OPEN DOOR, ETC., TO EXECUTE WARRANT. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after **notice of his** authority and **purpose**, he is refused admittance.

The importance of announcing the purpose for the visit is vitally important to the question of reasonableness. In this case, if the officers had simply stated that they were there to see Traci Trotman, Ms. Trotman would have opened the door.

As it was, the officers' silence on their purpose led Mr. Martin and Ms. Trotman to believe the police arrived at the prompting of his ex-wife. The whole incident would have been averted had the officers complied with the threshold constitutional requirement of the announcement of their purpose, which goes to the core reason for the requirement in the first place.

Certiorari should therefore be granted to prevent the published opinion below from rendering nugatory the ancient requirement of "notice."

ARGUMENT IV

BOTH THE U.S. DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT IMPARTED KNOWLEDGE OF DR. TROTMAN'S CALL TO THE OFFICERS DISPATCHED TO MR. MARTIN'S HOME, HOWEVER THE UNCONTRADICTED EVIDENCE OF THE AUDIO/VIDEO RECORDING DEMONSTRATES THAT THEY DID NOT KNOW THAT DR. TROTMAN WAS CONCERNED FOR HIS DAUGHTER'S SAFETY OR THOUGHT SHE "MIGHT BE IN TROUBLE."

All of the evidence in support of and in opposition to Defendants' Motion for Summary Judgment or in the Alternative, Summary Adjudication of Issues is reproduced in Appendix A, Pages 38-70. Both opinions below elide the gap between what Dr. Trotman said in his phone call to the Watch Commander and what information was transmitted to the officers on the scene by dispatch. Both opinions below highlight Dr. Trotman's concern for his daughter's safety and that she "might be in trouble."

The District Court states that what the officers observed at Mr. Martin's house was " . . . consistent with Dr. Trotman's statement to the police that he was urgently concerned for the welfare of his daughter, and suggested that she may, in fact, have been in trouble inside the house." (App. 25). The Court of Appeals imparts the information to the officers this way:

> First, the officers had reasonable grounds to believe that there existed an immediate need for their assistance. Traci's father phoned the police stating that he was urgently concerned for the welfare of his daughter and that she may be "in trouble" inside the house. Pursuant to receiving

> this information, the officers arrived at Martin's residence, where both Martin's and Traci's cars were in the driveway. (App. 7.)

However, the audio/video tape of the officer inside Mr. Martin's home makes clear that the officers had no knowledge of any urgent concern. After the police confronted Ms. Trotman and Mr. Martin, all go downstairs to the kitchen to clarify the situation. The officers telephoned the police station from Mr. Martin's home phone:

> Trotman: Why is he [Dr. Trotman] calling?
>
> OPD [Oceanside Police Dept.]: I heard you . . .
>
> OPD: I don't know, I don't know, I'll find out.
>
> Martin: Your dad calls the Oceanside Police Department and says something's wrong with you?
>
> OPD: No, no, no. Check the welfare . . . apparently he can't get a hold of her.

(App. 58.)

The fact that the officer did not have knowledge that Dr. Trotman expressed any urgent concern for his daughter is also confirmed by the Declaration of Shawn Kelly: "Dr. Trotman [asked] police to check on Ms. Trotman's welfare as he had been unable to reach her." (App. 39.) At best, the officers had information that an adult child had not returned her father's phone calls for a few days. But even this is not clearly established as information known before the officers called back to the station from Mr. Martin's kitchen. All that can be known from the evidence is that the officers were dispatched on a routine "check the welfare" call, so the opinions below are founded on the false premise that the officers were aware of any urgent

concern. An officers actions must be evaluated based on the information known to them at the time of the incident, not with 20/20 hindsight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). To impart knowledge to the officers that Dr. Trotman had some urgent concern for his daughter's safety would inject 20/20 hindsight into the analysis, as the lower courts have done, in contravention of the mandate of this Honorable Court.

Certiorari should therefor be granted to prevent lower courts from infecting their analysis with information not available to officers at the time of an incident.

CONCLUSION

In this case where the published opinion below creates an unprecedented obligation of people to answer the door to their homes when the police come knocking, though not announcing, Certiorari should be granted to the U.S. Court of Appeals for the Ninth Circuit.

The opinion below must also be addressed for extending the "community caretaking" exception to the warrant requirement directly into the home, dissolving the exigent circumstance standard established by this Honorable Court.

Certiorari is necessary to reassert the mandate of this Honorable Court that the obligation of law enforcement to knock and announce themselves and their purpose prior to entry must be considered in analyzing the reasonableness of an entry into the home.

And finally, a grant of Certiorari in this case will prevent lower courts from improperly ascribing post hoc knowledge to officers at the scene of an incident.

For all of these reasons, Mr. Martin respectfully requests that this Honorable Court grant Certiorari to the U.S. Court of Appeals for the Ninth Circuit.

Dated: June 9, 2004, at San Diego, San Diego County, California 92101.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mark Martin, *Plaintiff-Appellant,* v. City of Oceanside; Shaw Kelly; Benjamin Ekeland, *Defendants-Appellees.*	No. 02-56177 D.C. No. CV-00-01932-B/NLS OPINION

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Submitted January 9, 2004*
Pasadena, California

Filed March 11, 2004

Before: Stephen S. Trott, Johnnie B. Rawlinson, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Trott

COUNSEL

James E. Dunn, San Diego, California, for the plaintiff-appellant.

Pamela J. Walls, Assistant City Attorney, Oceanside, California, for the defendants-appellees.

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* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

OPINION

TROTT, Circuit Judge:

I

Overview

Mark Martin ("Martin") sued the City of Oceanside, California ("City") and police officers Shawn Kelly and Benjamin Ekeland ("officers") under 42 U.S.C. § 1983. He alleged that the officers violated his Fourth Amendment rights during an incident in which they entered Martin's home without a warrant in order to check on the welfare of an occupant. The district court determined that the officers were entitled to qualified immunity and thus granted their motion for summary adjudication. The court also granted the City's motion for summary adjudication on the ground that the City's officers had not committed a constitutional violation. Martin appeals the district court's specific determination that the officers were entitled to qualified immunity based on the "emergency aid" exception to the Fourth Amendment warrant requirement.

II

Background

On December 28, 1999 Dr. Ronald Trotman phoned the Oceanside Police Department from Portland, Oregon with an urgent request to check on the safety of his daughter, Traci Trotman ("Traci"). He had been unable to reach her for several days and told the police he was "extremely concerned" about her welfare, "and felt she could be in trouble." *Martin v. City of Oceanside,* 205 F. Supp. 2d 1142, 1144 (S.D. Cal. 2002). He also gave the police an accurate

description of her car. Around 4:30 p.m., acting on this "check the welfare" request, Officer Kelly arrived at Martin's home, where Traci was reportedly living as a roommate. He knocked and rang the doorbell, but no one answered. Unbeknownst to Officer Kelly, Martin and Traci were inside the home, but did not respond to his implicit request for an audience. Although they were aware that a uniformed police officer was at the door, they mistakenly and without substantial reason assumed that Martin's ex-wife had called the police and made a false accusation, and thus irresponsibly decided to ignore the officer's attempt to speak with them.

Officer Kelly observed that Traci's car was in the driveway, and had headquarters call her phone number. Traci and Martin ignored the call. Officer Kelly then walked to the side of the house where he found an unlocked door to the garage. It is disputed whether or not Officer Kelly announced his presence before entering the garage, but once inside he found an unlocked door leading to the main part of the house. At this point, Officer Kelly exited the garage. "Fearing that a crime could be in progress," he requested an additional officer. *Id.* at 1145.

While waiting for the other officer to arrive, Officer Kelly went next door, where the neighbor told him that she had seen a woman at the residence on Christmas day, three days prior, and a man there the day before. She added that because the occupants' cars were in the driveway, they should be home.

When Officer Ekeland arrived, both officers entered the house through the garage with their flashlights on and guns drawn. The officers quickly checked the downstairs, found no one, and then proceeded up the stairway to the

second floor. When they got to the top of the stairs, Traci exited the bedroom at the other end of the hallway. The officers requested that Traci identify herself. After a short argument about the officers not having a warrant, she produced identification. The officers confirmed that she was safe, and left the house shortly thereafter.

III

Standard of Review

We review de novo the district court's grant of summary judgment. *Jackson v. City of Bremerton,* 268 F.3d 646, 650 (9th Cir. 2001). Qualified immunity is particularly amenable to summary judgment adjudication because "the entitlement is an *immunity from suit* rather than a mere defense to liability." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) (internal quotations omitted)). However, we must still determine "whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

IV

Qualified Immunity

Martin alleged that the officers "violated his Fourth Amendment rights in three ways: first, by entering his house without a warrant or consent; second, by failing to knock and announce their presence as they entered; and third, by pointing their guns at him in the hallway of his

house." *Martin,* 205 F. Supp. 2d at 1148-49. Preliminarily, we determine that Martin has forfeited review of the claim that the officers' use of their guns constituted excessive force because the issue is not "specifically and distinctly" argued in his opening brief. *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir. 2001). Therefore, only the warrantless entry and failure to "knock and announce" claims are subject to review.

In *Saucier v. Katz,* the Supreme Court established a two-part analysis for determining whether qualified immunity attaches to specific circumstances. 533 U.S. 194, 201 (2001). The threshold inquiry, assuming as true the facts alleged by the injured party, is whether "the officer's conduct violated a constitutional right[.]" *Id.* If the answer to this question is "no," then the officers are entitled to qualified immunity. If the answer is "yes," however, then we must ask whether that right was clearly established. *Id.*

A. Emergency Aid Exception to the Warrant Requirement

Based on the facts as alleged by Martin, we conclude, as did the district court, that the "emergency aid" exception to the warrant requirement is applicable, and thus his constitutional rights were not violated. The "emergency aid" exception, adopted by this court in *United States v. Cervantes,* has three prongs:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable

> basis, approximating probable cause, to associate the emergency with the area or place to be searched.

219 F.3d 882, 888-90 (9th Cir. 2000) (quoting *People v. Mitchell,* 347 N.E.2d 607, 609 (N.Y. 1976)). In an emergency situation, police officers are permitted warrantless entry into a home as part of their "community caretaking function." *United States v. Bradley,* 321 F.3d 1212, 1214 (9th Cir. 2003); *see also Cervantes,* 219 F.3d at 889.

The district court correctly determined that the "emergency aid" exception provided the officers with qualified immunity; however, the court applied the exception under the second prong of *Saucier* rather than the first. In performing the initial inquiry, we are obligated to accept Martin's facts as alleged, but not necessarily his application of the law to the facts. The issue is not whether Martin states a claim for violation of his Fourth Amendment rights, but rather whether the officers *actually* violated a constitutional right. Because the "emergency aid" exception applies, we answer the threshold inquiry of *Saucier* in the negative. *See Mincey v. Arizona,* 437 U.S. 385, 392 (1978) ("[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid."). However, this minor error does not affect the ultimate determination by the district court that the officers were entitled to qualified immunity.

As discussed in the district court order, all three prongs of the *Cervantes* test are satisfied in this case. First, the officers had reasonable grounds to believe that there existed an immediate need for their assistance. Traci's father phoned the police stating that he was urgently concerned

for the welfare of his daughter, and that she may be "in trouble" inside the house. Pursuant to receiving this information, the officers arrived at Martin's residence, where both Martin's and Traci's cars were in the driveway. The suggestion by the neighbor that Martin and Traci should be home, in connection with the lack of response to repeated knocking, and an unanswered call to Traci's phone supported the officers' reasonable belief that they had a duty under the community caretaking function to investigate a potential emergency situation.

Second, there is no doubt that the officers' search was not motivated by an intent to arrest or to seize evidence. The only reason they were at Martin's home was in response to Traci's father's request to check the welfare of his daughter. Once the officers' identified Traci and were able to see that she was not in trouble, they left the residence shortly thereafter. Martin provides no evidence to suggest any motivation to the contrary.

Third, the Officers had a reasonable basis for associating a potential emergency with Martin's house. As discussed in *Cervantes,* in order to satisfy the third prong, an officer's search must be limited to only those areas necessary to respond to the perceived emergency. 219 F.3d at 890. The officers' reasonable conclusion that a potential emergency situation could be located inside Martin's home was sufficiently supported by a father's concern about his daughter, the neighbor's indication that the daughter should be in the residence, the presence of her car in the driveway, and the unexplained failure to respond to their knock on the door. The officers did no more than search the areas of Martin's home where Traci could potentially be located, and thus the third prong is satisfied.

In *Murdock v. Stout,* we determined that exigent circumstances justified a warrantless entry under conditions similar to those the officers confronted in this case. 54 F.3d 1437 (9th Cir. 1995). Although *Murdock* was decided prior to *Cervantes,* its analysis is very similar to the three-prong approach we have since adopted. In *Murdock,* three police officers arrived at a house after having received a call from a passing neighbor who had observed what he believed was suspicious activity at the home. When the officers arrived, the exterior doors were secure with the exception of the rear sliding door, which was slightly open. In addition, the lights and television were on, indicating that someone was or should have been at the residence. The officers shouted their presence, but received no response. No one answered the phone when it rang. The officers entered the home through the open door, and after a cursory search found the resident taking a nap. We held that

> indicat[ions] that a resident should have been home, but was not responding, combined with the earlier report of suspicious activity and the presence of the open door tip the scales to supply the officers with probable cause to believe . . . that a resident in the house might have been in danger or injured.

Murdock, 54 F.3d at 1442.

Just as in *Murdock,* there were indications here that either Traci or Martin should have been home, and indeed they were both inside. *Id.* In addition, both *Murdock* and the instant case involve reasonable requests that prompted the police to fulfill their responsibility to investigate potentially suspicious activity and protect the communities they serve. *Id.* at 1442. Therefore, the officers' warrantless entry

falls squarely within the emergency aid exception and community caretaking function, and as a result Martin's Fourth Amendment right to be secure in his home clearly was not violated.

B. The "Knock and Announce" Requirement

Martin contends that the police "failed to state the purpose of their intrusion" before entering his home. He characterizes this alleged failure as a constitutional violation of the "knock and announce" component of the Fourth Amendment. The district court granted summary judgment to the appellees on this issue on either of two grounds: 1) they substantially complied with the knock and announce rule, or 2) the entry was justified by the emergency aid exception. Without disagreeing with the district court, we grant summary judgment to the officers on this issue on a different but related ground: under the first prong of *Saucier,* Martin suffered no violation of the Fourth Amendment. There exists no genuine issue of material fact on this issue.

The facts are clear. The officers knocked on Martin's door shortly after 4:30 p.m. in the afternoon. The officers were in uniform. Martin heard the officers knocking and observed Officer Kelly through the peephole in his door. Martin recognized Officer Kelly as a police officer. Martin chose not to answer the door, opting instead to leave the area of the doorway and go upstairs to Traci's bedroom where he called his lawyer and secreted himself from the police. To see this set of facts as a violation of the Fourth Amendment's knock and announce rule is utterly incomprehensible. The prophylactic purpose of the rule is not served where the occupants of the home know that it is the

police knocking at the door and simply leave the area and choose not to answer.

Under these circumstances, the officers' entry was reasonable. *See Wilson v. Arkansas,* 514 U.S. 927, 936 (1995) (holding that "although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry[,]" and leaving to the lower courts "the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment"). Martin had ample opportunity to learn their purpose, and he ignored it. He and he alone is responsible for the officers' entry after he chose to play hide-and-go-seek with the authorities. His inexcusable behavior only added justification to believe that Traci's father's fears may have been well-founded. Had Martin simply responded, as a normal citizen, to the knock on his door, none of the events about which he complains would have happened. He is the "victim," not of the officers, but of his own faulty judgment and behavior. Moreover, because he left the area and went upstairs and into a bedroom to make a phone call, his allegation that he did not hear the police announce themselves is insufficient to create a genuine issue of disputed fact as to whether they did so, as they aver they did.

As discussed in the previous section, the officers reasonably believed that someone inside Martin's home was potentially in need of help, and they were motivated by a desire to assist that person rather than gather evidence. The officers' reasonable belief that Traci may have been in need of assistance inside the home justified their visit and subsequent entry. Citizens in the City of Oceanside would

have been justifiably outraged if the officers had delayed their community caretaking responsibilities only to discover later that Traci had become the victim of an otherwise preventable crime or was in need of assistance. The district court's order, granting summary adjudication to the officers and the City as to the 42 U.S.C.§ 1983 claims, is AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN, **Plaintiff,** **vs.** **CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, and DOES 1-20,** **Defendants.**	**CIV. No. 00CV1932-B(NLS)** **ORDER DENYING MOTION FOR SUMMARY JUDGMENT [Docket No. 9-1], GRANTING MOTION FOR SUMMARY ADJUDICATION [Docket No. 9-2], DENYING DEFENDANTS' OBJECTIONS [Docket No. 21-1], DENYING AS MOOT PLAINTIFF'S MOTION TO CONTINUE HEARING [Docket Nos. 24-1 AND 24-2] AND DISMISSING STATE LAW CLAIMS** **(Filed Jun. 7, 2002)**

I. INTRODUCTION

Before the Court are Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication of Issues, Defendants' Objections to Plaintiff's Opposition, and Plaintiff's Motion to Continue Hearing. The Court determined it appropriate to decide these matters without oral argument as permitted by Civil Local Rule 7.1(d)(1). For the reasons below, the Court denies Defendants' Objections to this Court's consideration of plaintiff's late-filed opposition brief, denies Plaintiff's motion to continue hearing, grants Defendants' Motion for Summary Adjudication of Issues as to the federal claims, and dismisses without prejudice the remaining pendent state law claims.

II. BACKGROUND

Mark Martin is suing the City of Oceanside and police officers Shawn Kelly and Benjamin Ekeland for claims rising out of an incident in which Officers Kelly and Ekeland entered Martin's house without a warrant and pointed loaded guns at him. Martin's complaint asserts two federal claims and four state common law claims: (1) a 42 U.S.C. § 1983 claim against the police officers for alleged violation of Martin's Fourth Amendment rights; (2) a 42 U.S.C. § 1983 claim against the City for unlawful policies, customs, or habits; (3) trespass; (4) false imprisonment; (5) intentional infliction of emotional distress; and (6) negligence.

At about 4:30 p.m. on December 28, 1999, Officer Shawn Kelly was dispatched to Martin's residence to "check the welfare" of Martin's roommate, Traci Trotman. Ms. Trotman's father, Dr. Ronald Trotman had called the Oceanside Police Department from Portland, Oregon urging that the police check on Ms. Trotman because he had been unable to reach her by phone for several days and was "extremely concerned and felt she could be in trouble." Defs.' Mem. P. & A. Supp. Summ. J. at 1; Dec. Dr. Ronald Trotman ¶ 2.

Officer Kelly went to Martin's home at 4904 Amador in Oceanside. He noticed Ms. Trotman's car parked outside (Trotman's father had given the police a description of her car). Officer Kelly knocked on the door and rang the doorbell at 4904 Amador, but no one answered.

In fact, both Martin and Trotman were inside the house. Although Martin saw a uniformed police officer at the door, he did not answer the door because he "assumed" his "ex-wife had called the police and made a false accusation." Dec. Martin ¶ 9. While Officer Kelly knocked at the

door, Martin "called [his] lawyer in [his] divorce case and asked him if [he] had to respond to this intrusion." *Id.*

When no one answered the door, Officer Kelly had dispatch call Trotman's phone number; dispatch did so and the line was answered by Trotman's answering machine. Defs.' Mem. P. & A. Supp. Summ. J. at 1. Officer Kelly then walked around the house to a side door (according to plaintiff, he got there by opening a latched gate and walking through the side yard). Defs.' Mem. P. & A. Supp. Summ. J. at 1.; Pl.'s Mem. P. & A. Opp. at 2. The side door was unlocked (defendants' word is "unsecured") but closed. Pl.'s Mem. P. & A. Opp. at 2. Officer Kelly opened it and entered plaintiff's garage. Kelly asserts that he entered after "identif[ying] himself with the Oceanside Police;" plaintiff disputes that Kelly announced his entry. Kelly Dec. ¶ 5. Pl.'s Mem. P. & A. Opp. at 2.

Inside the garage, Officer Kelly found and tried an unlocked door that led into the main house. "Fearing that a crime could be in progress," Officer Kelly exited the garage and requested an additional police unit. Kelly Dec. ¶ 5.

Officer Kelly then talked to the next door neighbor, who told Kelly that she had seen a female at the residence on Christmas day and a male at the residence the day before, that the occupants' cars were in the driveway, and that they should be home. Kelly Dec. ¶ 6. Officer Kelly "went back to the front door and started banging loudly on the door and pushing the door bell repeatedly. This went on for several minutes. There was no answer." *Id.* ¶ 7.

Officer Benjamin Ekeland arrived as the backup unit Officer Kelly had requested. Officer Kelly "explained the situation to him." Kelly Dec. ¶ 8. Both officers went back to the unlocked side door. The officers claim they "loudly

identified [them]selves as 'Oceanside Police.'" Martin claims they did not identify themselves at all. However, Martin by then was watching from Ms. Trotman's upstairs bedroom window "and could see . . . that defendant Kelly was wearing a police uniform." Pl.'s Mem. P. & A. Opp. at 3.

The officers entered the main house through the unlocked door in the garage. They entered "with their guns drawn for their own safety and that of the occupants." Defs.' Mem. P. & A. Supp. Summ. J. at 2. Using flashlights so they could see (it was dark outside by this time), the officers checked the downstairs area for people but found no one. They then started up the staircase to the second floor.

Meanwhile, Martin and Trotman were still in Trotman's bedroom. Martin had started his camcorder to videotape the officers. At the direction of Martin, Trotman came out of the bedroom to see what the officers wanted. The officers told her not to move and to identify herself. Martin then came out of the bedroom and stood next to Trotman. The officers, who were standing about 15 to 20 feet away, pointed their guns at Martin and Trotman. Martin Dec. ¶ 17. Trotman identified herself, and the officers holstered their guns. Defs.' Mem. P. & A. Supp. Summ. J. at 3. About four minutes elapsed from the time the officers entered the house and the time they notified dispatch that they were okay. *Id.*

III. STANDARD OF LAW

A. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if the "pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

Summary judgment must be granted if the party responding to the motion fails "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The evidence offered need not be in a form admissible at trial to avoid summary judgment. *Id.* at 324. When the moving party does not bear the burden of proof, summary judgment is warranted by demonstration of an absence of facts to support the non-moving party's case. *Id.* at 325.

The Court must determine whether evidence has been presented that would enable a reasonable jury to find for the non-moving party. *Liberty Lobby, Inc.,* 477 U.S. at 249-252. If the Court finds that no reasonable fact-finder could, considering the evidence presented by the non-moving party and the inferences therefrom, find in favor of that party, summary judgment is warranted.

If the Court is unable to render summary judgment upon an entire case and finds that a trial is necessary, it shall, if practicable, grant summary adjudication for any issues as to which standing alone, summary judgment would be appropriate. *See* Fed. R. Civ. P. 56(d); *see also California v. Campbell,* 138 F.3d 772, 780 (9th Cir. 1998), *cert. denied* (Oct. 5, 1998).

B. § 1983 Claim Asserting Fourth Amendment Violations Due to Unlawful Search, Unlawful Seizure, or Excessive Force – Qualified Immunity

A private right of action exists against persons who, acting under color of state law, violate a citizen's federal constitutional or statutory rights. 42 U.S.C. § 1983. The defense of qualified immunity, however, protects certain § 1983 defendants from the burden of litigation. A court presented with the issue must determine whether police officers sued under § 1983 have a valid qualified immunity defense before proceeding to the merits of the § 1983 claim because "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz,* 533 U.S. 194, 200 (2001), *quoting Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

Under the Supreme Court's recently established test, the determination whether police officers are qualifiedly immune is based on two questions. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. If the answer to the first question is "no," then the officers have qualified immunity. *Id.*

Precisely what information a court should review when attempting to answer this first question is an issue not directly addressed by the *Saucier* Court, nor by the Ninth Circuit in interpreting *Saucier.* Indeed, as far as this Court is aware, no court applying the *Saucier* test has explicitly stated what the Supreme Court meant when it held that trial courts must decide whether "the facts alleged" show violation of a constitutional right.

Though they have not addressed the point explicitly, courts nevertheless seem to have come to different conclusions about what the Supreme Court meant by "the facts alleged." In one case, for example, the Ninth Circuit "[a]ssum[ed] [plaintiff's] version of the facts is correct" without specifying whether it was reviewing the facts alleged in plaintiff's complaint or the facts established by plaintiff's summary judgment affidavits. *See Jackson v. City of Bremerton,* 268 F.3d 646, 652 (9th Cir. 2001). In another case, the Ninth Circuit first stated that it reviews "*the facts* taken in the light most favorable to the plaintiff" but then stated it "conclude[d] that the plaintiff has *alleged* a [constitutional] violation." *See Robinson v. Solano County,* 278 F.3d 1007, 1013 (9th Cir. 2002) (emphasis added).

Other circuits' opinions are no more helpful in resolving the issue. In one case, the Third Circuit appears to have reviewed only the *plaintiffs'* summary judgment submissions in answering the first *Saucier* question. *See Bennett v. Murphy,* 274 F.3d 133, 136 (3d Cir. 2002). The Fourth Circuit has considered the "uncontradicted evidence" submitted by *both parties* in their summary judgment briefs to determine whether a constitutional violation occurred. *See Clem v. Corbeau,* 284 F.3d 543, 550-51 (4th Cir. 2002). And the Eleventh Circuit has determined whether a constitutional right would have been violated "under the *plaintiff's* version of the facts." *See Lee v. Ferraro,* 284 F.3d 1188, 1194 (11th Cir. 2002) (emphasis in original).

Because the circuits have come to different conclusions, this Court is left to make its own determination of what the Supreme Court meant when it said a court should review "the facts alleged" to determine whether

plaintiff has established a violation of a constitutional right. To this Court, the phrase "the facts alleged" means the facts alleged in plaintiff's complaint that form the basis of the plaintiff's § 1983 claims. *See Black's Law Dictionary,* 68 (5th ed. 1979) (defining "allegation" as "[t]he assertion, claim, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove"). This conclusion adheres most closely to the precise legal meaning of "the facts alleged." It also is the interpretation that allows the first *Saucier* question – whether a constitutional right was violated – to remain as distinguishable as possible from the merits of plaintiff's § 1983 claim. That the analysis of defendants' qualified immunity defense is not duplicative of the analysis of the merits of plaintiff's § 1983 claim is a theme the *Saucier* Court emphasized more than once. *See, e.g., Saucier,* 533 U.S. at 203, 205 ("In *Anderson,* . . . we rejected the argument that there is no distinction between the reasonableness standard for warrantless searches and the qualified immunity inquiry;" "[t]he qualified immunity inquiry . . . has a further dimension [from the merits of plaintiff's constitutional claim]"). Finally, determining the answer to the first *Saucier* question by reviewing the factual allegations in plaintiff's complaint presents the least restrictive barrier to a plaintiff suing for deprivation of federal rights. For all these reasons, this Court finds that in answering the first qualified immunity inquiry under *Saucier,* a court should review the facts alleged in plaintiff's complaint to determine whether plaintiff has asserted a constitutional violation.

As stated above, if a court finds that plaintiff has failed to assert a constitutional violation, the inquiry is over and the officer is entitled to qualified immunity.

Saucier, 533 U.S. at 201.[1] However, if the answer to the first question is "yes," the court must ask a second question: "whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right." *Jackson,* 268 F.3d at 651.

In answering this question, a court is not restricted to the allegations of plaintiff's complaint. Instead, because it is looking at events from the point of view of a reasonable police officer, a court addressing the second qualified immunity inquiry must necessarily refer to the evidence submitted by all parties. The court must review the evidence and determine whether the constitutional right allegedly violated was clearly established, and whether the officer could have reasonably but mistakenly believed his conduct did not violate that right. *See Robinson,* 278 F.3d at 1015-1016 ("'If the law did not put the officer[s] on notice that [their] conduct would be unlawful, summary judgment based on qualified immunity is appropriate.'"), *quoting Saucier,* 533 U.S. at 202.

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[1] *Saucier* does not explicitly say that a negative reply to the first question results in a finding of qualified immunity. It states, "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201. One could argue that a negative answer to the first question terminates that entire cause of action as to all defendants for failure to state a cause of action. This Court interprets the Court's meaning only to establish the qualified immunity of the officers whose conduct was the subject of the allegations.

C. Unlawful Policies, Customs, or Habits Claim Against a City Under § 1983

A municipality may be held liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. . . ." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Furthermore, if police officers' conduct was unconstitutional, and if it was based on a city's official policy, the city can be held liable for violation of the plaintiff's constitutional rights. *Id.* Additionally, if a police officer is given qualified immunity on grounds that he acted unconstitutionally, but he reasonably believed he was not violating a clearly established right, the City can still be held liable for creating the policy that caused the officer's unconstitutional conduct.

However, if a court finds that the officer did not, in fact, violate plaintiff's constitutional rights, the plaintiff's claim against the city fails because "[n]either a municipality nor a supervisor . . . can be held liable under § 1983 where no injury or constitutional violation has occurred." *Jackson,* 268 F.3d at 653, *citing City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). Therefore, if a court finds that the defendant police officers acted constitutionally, any § 1983 claims against a city based on the officers' conduct also fail.

IV. ANALYSIS

As a preliminary matter, defendants have objected to the Court's consideration of plaintiff's opposition brief because it was untimely filed in violation of a stipulated briefing schedule approved by the Court. The Court has

considered defendants' objection and exercises its discretion to consider plaintiff's opposition brief, although it was untimely filed. Defendants' objection is therefore denied. The Court additionally notes that plaintiff filed several other documents and a video tape on the Friday before the hearing for this motion was scheduled in violation of the time limits set forth in Civil Local Rule 7.1(e). The Court has exercised its discretion to accept those documents and video tape and has reviewed them as well. Plaintiff's Motion to Continue Hearing is therefore denied as moot.

A. Claim for Violation of 42 U.S.C. § 1983 Against Police Officers Kelly and Ekeland

Plaintiff alleges that defendants violated his Fourth Amendment rights in three ways: first, by entering his house without a warrant or consent; second, by failing to knock and announce their presence as they entered; and third, by pointing their guns at him in the hallway of his house. Defendants argue that they are entitled to qualified immunity from liability for plaintiff's § 1983 claims. They contend that Officers Kelly and Ekeland's entry into plaintiff's house was justified under the "community caretaking" exception[2] to the warrant requirement. Defs.' Mem. P. & A.

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[2] The "community caretaking" exception, described by the California Supreme Court in *People v. Ray*, 21 Cal.4th 464 (1999), purports to expand on the "emergency aid" exception to the warrant requirement. Under the emergency aid exception, which is accepted by the Ninth Circuit, an officer may enter a dwelling to give emergency assistance to a person whom they reasonably believe to be in distress. *See, e.g., United States v. Cervantes,* 219 F.3d 882, 889 (9th Cir. 2000). The community caretaking exception described in *People v. Ray* encompasses the emergency aid exception as well as officers' warrantless

(Continued on following page)

Supp. Summ. J. at 4, citing *People v. Ray,* 21 Cal.4th 464 (1999). Defendants also argue that mere pointing of guns does not constitute excessive force under the Fourth Amendment, and further, that the show of force was necessary for the officers' security and the safety of the occupants in the house. *Id.* at 6-8.

To determine whether Officers Kelly and Ekeland are shielded by qualified immunity, this Court must first ask whether, taken in the light most favorable to the party asserting the injury, the facts alleged in plaintiff's complaint show the officers' conduct violated a constitutional right. *Saucier,* 533 U.S. at 201. Below, the Court finds that the answer to the first *Saucier* question is "yes" as to plaintiff's allegations of warrantless entry, failure to knock and announce, and excessive force state claims against the officers for Fourth Amendment violations. However, the Court answers "yes" to the second *Saucier* question, that is, whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right, because the officers acted reasonably under the circumstances. Therefore, the officers are entitled to qualified immunity.

1. Warrantless entry into Plaintiff's home

Plaintiff's complaint alleges that Officers Ekeland and Kelly entered his home without a warrant, without his consent, and under nonexigent circumstances. Compl.

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entry into a home if they have articulable suspicion that a burglary is taking place or has taken place. *Ray,* 21 Cal.4th at 471-474.

at ¶¶ 8-14. These allegations of warrantless entry into plaintiff's home, unjustified (according to plaintiff) by any exception to the warrant requirement, state a *prima facie* claim for violation of plaintiff's Fourth Amendment rights. Therefore, plaintiff overcomes the first qualified immunity hurdle.

However, in answering the second qualified immunity question, the Court considers the plaintiff's and the officers' version of events, as established by their summary judgment papers, rather than merely the factual allegations in plaintiff's complaint. Here, the undisputed evidence shows that the officers' warrantless entry was justified by the "emergency aid" exception[3] to the Fourth Amendment's warrant requirement. Therefore, the answer to the second *Saucier* question is "yes" because they reasonably (and correctly) believed they were acting in accordance with an exception to the Fourth Amendment's warrant requirement.

The "emergency aid" exception permits an officer's warrantless entry into a home "in their community caretaking function to respond to emergency situations." *United States v. Cervantes,* 219 F.3d 882, 889 (9th Cir. 2000). There are three requirements for meeting the emergency aid exception: (1) the police had "'reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property;'" (2) the "search must not be primarily

[3] As stated above in footnote 2, the "community caretaking" exception relied on by Defendants encompasses the "emergency aid" exception.

motivated by intent to arrest and seize evidence;" and (3) there was a "'reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.'" *Cervantes,* 219 F.3d at 889-890, *quoting People v. Mitchell,* 39 N.Y.2d 173 (1976).

Here, all three prongs are met, and the emergency aid exception therefore applies. First, the undisputed evidence shows that Officers Kelly and Ekeland had reasonable grounds to believe that there was an emergency at hand. The officers were informed that Martin's and Trotman's cars were in front of the house, and that they should have been home. But no one answered the door in response to the officers' repeated knocking, and Trotman did not answer her phone when dispatch called. The circumstances were consistent with Dr. Trotman's statement to the police that he was urgently concerned for the welfare of his daughter, and suggested that she may, in fact, have been in trouble inside the house.

Second, the officers' search was not motivated by intent to arrest or to seize evidence. The officers' actions, sweeping the first floor of the house for people, and then going upstairs to search for occupants, were entirely consistent with their claim that they were searching for Trotman and were concerned for her welfare. Nor does plaintiff provide any evidence that contradicts this conclusion.

Third, the police had a reasonable basis for searching the house to find Trotman. The neighbor said Trotman's and Martin's cars were parked outside the home, and that both occupants should be there. Moreover, the neighbor appeared to be familiar with Trotman and Martin, saying she had seen them at home a few days before, and thus

provided the police with reason to believe they could rely on her expectation that Trotman and Martin were at home. It was therefore reasonable of the police to search Martin's house to find Trotman.

In sum, the officers' entry into Martin's home was justified by the emergency aid exception to the Fourth Amendment's warrant requirement. Therefore, the officers are entitled to qualified immunity as to this claim.

2. Failure to "knock and announce"

Next, plaintiff argues that tne officers acted unreasonably in violation of the Fourth Amendment by violating the "knock and announce" rule. Plaintiff's complaint states that he "heard loud knocking at his front door," but that the officers "failed to identify themselves as police officers;" that he "chose not to answer the door," and that twenty minutes later, the officers appeared in his upstairs hallway. Compl. ¶¶ 8, 9. Essentially, according to plaintiff's allegations, the officers knocked and waited to enter, but they failed to announce their identity as police officers or the purpose of their presence.

The Court first finds that plaintiff's complaint, construed liberally, does set forth a claim for a Fourth Amendment violation. "[I]n some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." *Wilson v. Arkansas,* 514 U.S. 927, 934 (1995). While the knock and announce rule has generally been applied only to execution of a warrant, *Wilson* does not limit the rule to that circumstance. Therefore, it is conceivable that for officers' entry into a home pursuant to the emergency aid exception to be constitutional, the officers must comply with the knock

and announce rule. For purposes of this claim, the Court assumes that officers are not excused from knocking and announcing simply because they are entering a house for some reason other than to execute a warrant.

The knock and announce rule itself has been held to contain four components: "(1) knock; (2) identification as law enforcement officer; (3) express the purpose of the officer's presence and the authority for the search or seizure; and (4) wait a reasonable time for occupant to allow or refuse entry." *United States v. Beckford,* 962 F. Supp. 767, 774 (E.D. Va. 1997). Failure to fulfill all components of the knock and announce rule can, in some circumstances, amount to insufficient notice by the officers and thereby render a search unconstitutional. *See, e.g., United States v. Rodriguez,* 663 F. Supp. 585 (D.D.C. 1987) (failure to wait reasonable time for refusal constituted violation of 18 U.S.C. § 3109, which codifies knock and announce rule).

However, ultimately, the failure – or partial failure – to knock and announce does not make a search automatically unreasonable under the Fourth Amendment. "[L]aw enforcement interests may also establish the reasonableness of an unannounced entry." *Wilson,* 514 U.S. at 936. For example, the officer's reasonable belief that a mild exigency existed has been been [sic] declared sufficient to justify total failure to knock and announce. *United States v. Hudson,* 100 F.3d 1409, 1417 (9th Cir. 1996) (finding mild exigency of " 'likelihood' that the occupants would 'try to escape, resist, or destroy evidence' " justified failure to await refusal before entering and executing warrant, in violation of 18 U.S.C. § 3109). Ultimately, whether failure to knock and announce renders a search unreasonable is a decision to be made by the district court on a case-by-case

basis. *See Wilson,* 514 U.S. at 936 (" . . . we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.").

As one would expect, plaintiff's complaint does not give any justification for the officers' allegedly unannounced entry. Instead, as described above, it merely states that the officers knocked and waited to enter, but they failed to announce their identity as police officers or the purpose of their presence. Though these alleged facts certainly do not amount to an egregious violation, the complaint does state a claim for unconstitutional conduct by the officers. Therefore, the answer to the first *Saucier* question as to this claim is "yes."

However, the Court finds that the officers are entitled to qualified immunity because their conduct did not violate a clearly established right of plaintiff's. Failure to knock and announce is but a factor that goes to the reasonableness of an officer's search of a home. *Wilson,* 514 U.S. at 931. Knocking and announcing is not an element of a constitutional search the failure of which makes a search of a home *per se* unreasonable. Instead, the reasonableness of the search is determined by looking at the totality of the circumstances presented to the officers, and balancing the occupant's privacy interests and interests in being informed about the officers' impending entry against the government's interests in entering without knocking or announcing.

Ultimately, looking at the four knock and announce components individually, what we have in this case is a situation where (1) it is undisputed that the police *did* knock and ring the doorbell; (2) it is *disputed* whether the

officers announced their presence;[4] (3) it is undisputed that the officers *did not* announce the express purpose of their presence; and (4) is undisputed that the officers *did* wait for twenty minutes – more than a reasonable amount of time – before entering. *See Beckford,* 962 F. Supp. at 774, *and see United States v. Spikes,* 158 F.3d 913, 926 (6th Cir. 1998) (fifteen to twenty seconds a constitutionally reasonable amount of time to wait before entering). Thus, the Court must consider whether the officers' partial noncompliance with the knock and announce rule – their failure to announce their presence and express their purpose – renders their search of plaintiff's house constitutionally unreasonable.

Here, the officers' search of the house was reasonable in spite of their alleged failure to announce their identity and admitted failure to reveal their purpose. First, the officers substantially complied with the knock and announce rule. The officers did knock and ring the plaintiff's doorbell for several minutes. The police department attempted to phone Traci Trotman to let her know they were trying to locate her. And the officers waited a substantial amount of time before entering plaintiff's home. Thus, at the very least the first and fourth factors were satisfied more than adequately, and the phone call to Trotman's answering machine was at least an attempt by others at the police department to announce their general purpose of locating her, which attempt might arguably

[4] This factual dispute is not material to the Court's resolution of this claim, because even assuming that the officers failed to announce their identity, the Court still finds, for the reasons given below, that their search of the house was reasonable under the Fourth Amendment.

satisfy the third knock and announce component. Finally, plaintiff admits he could see from his upstairs window that the person knocking and ringing his doorbell was a police officer, making the announcement of the officers' identity almost a non-issue.

Second, any failure on the part of the officers to fully comply with the knock and announce rule was justified by the emergency aid exception and the mild exigency created by the apparent danger of the situation. The Court has already concluded that the officers' entry into plaintiff's home was justified by the emergency aid exception to the warrant requirement. The officers had reason to believe that the circumstances indicated that someone in the house may have been in danger, and they also had reason to believe that there were occupants in the house who refused to answer the door. Balancing the government's interest in ensuring the safety of what the officers believed was a potential victim in the house against plaintiff's interest in having the officers identify themselves as police officers without his having to reveal his presence in the house, the Court concludes officers' conduct was reasonable. Moreover, given the mild exigency created by the officers' belief that there were occupants in the house who passively objected to their presence by ignoring the officers' knocking and ringing the doorbell, the officers' alleged failure to announce their purpose was justified. *See Hudson,* 100 F.3d at 1417 (mild exigency justified officers' failure to await refusal before entering and executing warrant).

Therefore, the officers did not violate a clearly established right of plaintiff's. The officers are entitled to qualified immunity as to this claim.

3. Pointing guns at Martin

Finally, plaintiff claims that the officers' pointing their guns at Martin constituted excessive force under the Fourth Amendment. Again, the Court first has to determine whether plaintiff's complaint alleges facts which, if true, would amount to a constitutional violation by the officers. Plaintiff's complaint alleges that Officers Kelly and Ekeland entered his house without his knowledge or consent, and that "Plaintiff was confronted in the hallway by Defendant Police Officers KELLY and EKELAND with their guns drawn, pointing them threateningly at plaintiff and his roommate." Compl. ¶ 9. The complaint further alleges that "Plaintiff had committed no crime and was suspected of none. There was no reason for the Defendants to be threatening him with their guns." *Id.* ¶ 10.

The allegations in plaintiff's complaint state a claim for excessive force. The basic test for excessive force is whether the officers used force that was not objectively reasonable under the circumstances with which the officer was presented. *Robinson,* 278 F.3d at 1013. In assessing whether a police officer has used excessive force, courts consider whether "factors justifying the use of force were present." *Id.* at 1014. These factors include "'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* at 1013-14, *quoting Graham v. Connor,* 490 U.S. 386, 397 (1989).

Here, plaintiff's complaint avers that the officers pointed guns at plaintiff. The Ninth Circuit has held that mere pointing of guns may constitute unconstitutionally excessive conduct. *Robinson,* 278 F.3d at 1014. Moreover,

the complaint states that there was no justification for the officers' use of force: plaintiff was not the suspect of a crime, nor (according to plaintiff) was there any other reason justifying the officers' use of force. Based on these allegations, the Court finds that plaintiff's complaint states a claim for excessive force by the officers.

However, proceeding to the second qualified immunity question, the Court finds that a review of both parties' submissions makes it clear that, based on the undisputed facts, the officers' use of force was objectively reasonable under the circumstances; therefore, their conduct did not violate a clearly established constitutional right. As stated above, the determination whether a show of force was excessive requires a court to balance the nature of the intrusion against the government interests at stake. *Jackson,* 268 F.3d at 652. In assessing whether an officer's use of force violated the Fourth Amendment, courts are counseled to "'allow[] for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Id.* at 651, *quoting Graham v. Connor,* 490 U.S. 386, 396-97 (1989). Relevant to an officer's decision to use force is whether "dangerous or exigent circumstances" existed that made it objectively reasonable for the officer to conclude that some show of force was necessary. *Robinson,* 278 F.3d at 1014.

Here, the undisputed facts are that the officers had entered the house to check on Traci Trotman's welfare. They were walking through a dark house with the use of flashlights. The facts at hand – for example, the neighbor's statement that the occupants should be in the house, and the fact that Martin's and Trotman's cars were parked

outside – reasonably caused the officers to suspect there were people in the house. The occupants' refusal to answer the door would have caused a reasonable police officer to conclude there might be some resistance to their entry. Under the circumstances, which here were clearly "tense, uncertain, and rapidly evolving," the officers' split-second choice to point guns when they came upon a woman and man upstairs was not unreasonable. Moreover, as soon as the officers realized that the woman was Trotman, and that there was no danger, they holstered their guns.

Under the circumstances, the officers' pointing guns at Martin was reasonable and did not violate the Fourth Amendment's prohibition against excessive force. Therefore, the officers are entitled to qualified immunity as to plaintiff's excessive force claim.

4. Summary: Qualified Immunity Defense

Having analyzed the second inquiry of *Saucier* regarding defendant officers' qualified immunity defense, whether officers reasonably believed their conduct did not violate any clearly established constitutional right of the plaintiff, the Court finds the answer to be "yes" as to all three of plaintiff's theories of Fourth Amendment violations. This is so because looking at the undisputed facts from both parties' summary judgment papers, it is clear that the officers' conduct did not violate the Fourth Amendment rights of plaintiff at all. Officers Ekeland and Kelly are thus entitled to dismissal of the first claim of plaintiff's complaint (§ 1983 cause of action) based on their qualified immunity.

B. Claim for Violation of 42 U.S.C. § 1983 Against the City

Plaintiff's second cause of action states a claim against the City of Oceanside for establishing the policies that caused the officers' conduct. Compl. ¶¶ 21-23. Such *Monell* claims against municipalities impose liability on the city where its policies caused the officers' illegal conduct. However, such claims cannot succeed unless there was unconstitutional conduct on the part of the officers. *See Monell,* 436 U.S. at 691 (" . . . Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort"); *see also Jackson,* 268 F.3d at 653 ("Neither a municipality nor a supervisor, however, can be held liable under § 1983 where no injury or constitutional violation has occurred"), *citing City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). If a court finds the officers acted constitutionally, the city has no liability under § 1983.

Here, the Court has already concluded that the officers' conduct was not unconstitutional. It is true that the Court has answered the first *Saucier* question, whether plaintiff alleges facts that show a constitutional violation by the officers, in the affirmative. However, it is equally clear from the Court's analysis above that in answering the second *Saucier* question, in the course of which the Court is permitted to review both parties' summary judgment papers, rather than just plaintiff's complaint, the Court has determined that the uncontradicted facts show the officers did not violate plaintiff's constitutional rights. First, the Court has determined that the officers' entry into plaintiff's home was justified by the "emergency aid" exception to the Fourth Amendment's warrant requirement. Second, the Court has found that

the officers' alleged failure to announce their presence and purpose, even if true, did not make their search of plaintiff's home unreasonable under the Fourth Amendment. Third, the Court has determined that the officers' pointing guns at plaintiff did not constitute excessive force under the circumstances.

Therefore, because the officers' conduct did not violate plaintiff's constitutional rights, there is no unconstitutional action which can be charged against the City, and plaintiff's *Monell* claim against the City fails.

C. Remaining State Law Claims

All that remain in this case, once plaintiff's claims for violation of 42 U.S.C. § 1983 are dismissed, are four state law tort claims. Under 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction." The Court, having dismissed plaintiff's federal claims, declines to exercise supplemental jurisdiction over the remaining state law claims. *See, e.g., Reed v. Iranon,* 940 F. Supp. 1523, 1531-32 (D. Hawaii 1996) (declining, under 18 U.S.C. § 1367(c)(3), to exercise supplemental jurisdiction over state claims after dismissing claim under 42 U.S.C. § 1983). The state claims are accordingly dismissed without prejudice.

V. CONCLUSION

For the reasons stated above, the Court hereby DENIES Defendants' Objections to Plaintiff's Opposition and DENIES as moot Plaintiff's Motion to Continue Hearing

and Allow for Litigation on the Merits. The Court DENIES Defendants' Motion for Summary Judgment as to all Plaintiff's claims. The Court GRANTS Defendants' Motion for Summary Adjudication as to Plaintiff's claims against Defendants for violation of 42 U.S.C. § 1983. The § 1983 claims are accordingly DISMISSED with prejudice. Plaintiff's remaining claims under state law for unlawful entry/trespass, false imprisonment, intentional infliction of emotional distress, and negligence, are hereby DISMISSED without prejudice.

IT IS SO ORDERED.

DATED: 6-7-02

/s/ Rudi M. Brewster
UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Case Number:
3:00-cv-01932
(Filed Jun. 11, 2002)

Martin – PLAINTIFF

v.

City of Oceanside – DEFENDANT

___ JURY VERDICT. This action came before the U.S. District Court for trial by jury. The issues have been [illegible] jury has rendered its verdict

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT plaintiff's motion to accept plaintiff late-filed papers as moot, denying plaintiff's motion to continue the hearing to any date convenient for the court and the defendant to allow for litigation on the merits as moot, denying motion for summary judgment, and granting motion for summary adjudication of issues (FRCP 56); denying defendant's motion response; the 1983 claims are dismissed with prejudice; the plaintiff's remaining claims are dismissed without prejudice.

6/11/02
Date

W. Samuel Hamrick, Jr.
Clerk

/s/ A. McDaniel

Entered on 6/11/02

pre – Brewster
ref – Stormes

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN Plaintiff, vs. CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, AND DOES 1-20, Defendant	Case No. 00 CV 1932 B (NLS) DECLARATION OF SHAWN KELLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES (Filed Feb. 8, 2002) DATE: March 11, 2002 TIME: 10:30 A.M.

I, Shawn Kelly, declare:

1. I am currently a Police Officer with the Oceanside Police Department. I have been so employed by the department since July 18, 1993. Prior to that time, I was employed by the San Diego Harbor Police as a Police Officer for six (6) years. Prior to my employment with the San Diego Harbor Police, I was a Military Policeman

in the United States Air Force for approximately four (4) years. I am currently a Patrol Officer.

2. On December 28, 1999, at approximately 4:11 p.m., I was dispatched to check the welfare of a Traci Trotman who resided at 4904 Amador, Oceanside. Police Officer Pete Riehm, had made the request after receiving a telephone call from Traci Trotman's father, Dr. Trotman, asking police to check on Ms. Trotman's welfare as he had been unable to reach her. It was reported that she drove a blue Subaru station wagon.

3. I arrived at 4904 Amador in uniform and in a marked police vehicle. I observed two vehicles in the driveway, one being the blue Subaru station wagon, the other vehicle was a pick-up truck registered to the 4904 Amador address. I loudly knocked on the door repeatedly and rang the doorbell several times. No one responded.

4. I called dispatch to place a call to the residence. A phone call was made to Ms. Trotman's phone number but it was not answered and was intercepted by Ms. Trotman's answering machine.

5. I walked around the exterior of the residence and located an unsecured side door to the garage. I identified myself with the Oceanside Police Department and opened the door. There was no response. I entered the garage and located a second door inside the garage that led to the house. This door was unsecured as well. I immediately exited the garage and requested an additional police unit.

6. I contacted the next door neighbor (at 4902 Amador) who told me that she had seen a female at the

residence on Christmas day (three days ago) and a male at the residence the day before. She further stated that the occupants cars were in the driveway and that they should be home.

7. I again went back to the front door and started banging loudly on the door and pushing the door bell repeatedly. This went on for several minutes. There was no answer.

8. Officer Ekeland arrived in uniform and in a marked police vehicle. I explained the situation to him. We then proceeded to the side door leading into the garage and loudly identified ourselves as "Oceanside Police." We received no response, and entered into the garage. We then identified ourselves again as "Oceanside Police" and upon receiving no response, entered into the residence with our firearms drawn for our safety and the safety of the occupants.

9. We did a quick check of the downstairs to ensure that no one was present or in need of our assistance. We did not search any cupboards or containers nor did we seize any contents of the residence. A check of the downstairs revealed no one was present. We proceeded up the stairway to the second floor. I was just beginning to check the room at the top of the stairway, when I heard Officer Ekeland say something to the effect of "don't move".

10. A woman and a man had exited the room from the other end of the hall about fifteen (15) to twenty (20) feet from where we were standing. Our firearms were still drawn and were pointed in their direction.

11. We asked them to identify themselves. The woman refused to identify herself at first, but then produced her identification. Once we confirmed that the woman was Traci Trotman, we immediately holstered our weapons. The man identified himself as Mark Martin. Less than two (2) minutes elapsed from the time that Ms. Trotman and Mr. Martin exited the bedroom before we holstered our weapons. Only about four (4) minutes elapsed from the time we entered the residence until the identifications were made, we holstered our weapons and notified dispatch that everything was "OK." We did not have any physical contact with either Ms. Trotman or Mr. Martin.

12. Mr. Martin and Ms Trotman asked us why were in the residence and if we had a warrant. We told them that we were there on a check the welfare call. We then went downstairs to explain the situation to them. We provided Dr. Trotman's phone number to Ms. Trotman and she confirmed it was her father's phone number. Ms. Trotman said that she had received a call concerning a medical emergency of a friend and told us "you're not on a goose chase." Mr. Martin said that he knew we were there but did not acknowledge that he or Ms. Trotman were in the residence. Mr. Martin stated he did not respond because he thought that we were a "prank" by his ex-wife and that he has had trouble in the past with his ex-wife. Mr. Martin further stated that he was on the phone to his attorney when we were identifying ourselves and did not acknowledge he was in the residence because his attorney told him not to do so.

13. We entered the residence with our firearms drawn because we believed that a crime may be in progress or had occurred and the occupants had met

with foul play or could possibly need medical attention. I had knocked loudly on the doors and rang the doorbell repeatedly during the approximately twenty (20) minutes I was on the premises before entering into the residence. The circumstances indicated that the occupants were home. Their vehicles were parked in the driveway. The next door neighbor said she thought that they were home. However, no one responded to the telephone call or to the repeated knocking and ringing the doorbell. Dr. Trotman, Ms. Trotman's father, had requested that we check the welfare of his daughter as he had been unable to reach her. Both the side door and the garage door leading into the residence were unsecured. Given my almost nineteen (19) years of experience and training as a Police Officer, these circumstances necessitated my immediate action to ensure the safety of the occupants.

I declare under penalty of perjury that the foregoing facts are true and accurate.

Executed on February 4, 2002, at Oceanside, California.

/s/ Shawn Kelly
Shawn Kelly

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN Plaintiff, vs. CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, AND DOES 1-20, Defendant	Case No. 00 CV 1932 B (NLS) DECLARATION OF DR. RONALD TROTMAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES (Filed Feb. 8, 2002) DATE: March 11, 2002 TIME: 10:30 A.M.

I, Dr. Ronald Trotman, declare:

1. I am the father of Traci Trotman. My address is 10424 North East Wasco, Portland, Oregon.

2. On December 28, 1999, I called the Oceanside Police Department and urged them to check on the welfare of my daughter, Traci Trotman, as I had been unable to reach her for several days. I had left several messages for her that had not been returned. I was extremely concerned and felt she could be in trouble. I wanted to have the police check on her safety as soon as possible and expressed an urgency in my request and concern for her welfare.

3. I provided my daughter's residence address (4904 Amador, Oceanside), telephone number and make and color of vehicle she owned (blue Subaru station wagon) when I spoke to the Police Officer and conveyed my request to check on the welfare of my daughter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 7, 2002, at Portland, Oregon.

/s/ Ronald Trotman, DMD
DR. RONALD TROTMAN, DMD

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN Plaintiff, vs. CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, AND DOES 1-20, Defendant	Case No. 00 CV 1932 B (NLS) DECLARATION OF PETER RIEHM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES (Filed Feb. 8, 2002) DATE: March 11, 2002 TIME: 10:30 a.m..

I, PETER RIEHM, declare:

1. I am currently a Police Officer with the Oceanside Police Department. I have been so employed by the department since January 31, 1982. On December 28, 1999,I was assigned light duty due to a knee injury and was working the Watch Commander's Office when a call

came in from a man who identified himself as Dr. Trotman.

2. Dr. Trotman stated that he was calling from Portland, Oregon and urged the Police Department to check on the welfare of his daughter, Traci Trotman. Dr. Trotman stated that he had tried for several days to reach his daughter, Traci Trotman, but was unable to do so and felt that she could be in trouble. Dr. Trotman was extremely concerned about the welfare of his daughter and had an urgency in his voice. Dr. Trotman provided his daughter's residence address, telephone number and make and color of vehicle she owned.

3. As a result of Dr. Trotman's call and concern for his daughter, I requested an officer visit the residence and to check on her welfare and safety.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 4, 2002, at Oceanside, California.

/s/ Peter Riehm
PETER RIEHM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN, Plaintiff, vs. CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, AND DOES 1-20, Defendant.	Case. No. 00 CV 1932 B (NLS)

DECLARATION OF MARK MARTIN

I, Mark Martin, declare under penalty of perjury that the following is true and correct based on my personal knowledge, and further, if called to testify under oath I would testify as follows:

1. On December 28, 1999, at approximately 4:30 PM I was in my home, minding my own business, when one of the defendants, apparently Shawn Kelly, came to my door and eventually began knocking on it, ringing the doorbell, and then loudly banging on the door to the point that it was frightening.

2. At no time prior to entry into my home did either defendant Kelly or defendant Ekeland ever announce themselves as police or announce a purpose for their coming onto my property. If they just said they were here to see Ms. Trotman, we would have opened the door.

3. I subsequently learned that Defendant Kelly entered my home by himself, and then exited; he did not

announce himself prior to entering my garage that first time.

4. Neither defendant Kelly nor defendant Ekeland announced themselves prior to or during the second entry into my home (until they confronted Ms. Trotman), where they both entered the main living area of the house.

5. I have read the Declaration of Shawn Kelly and his statement in paragraph 5 of that declaration that he identified himself "with the Oceanside Police Department" is false.

6. All of the doors to my house were closed.

7. It is true that the side door to the garage and the door from the garage into the main living area of the house were unlocked, however they were physically closed, and the only way you could tell if they were unlocked is if you opened them.

8. I could see that defendant Kelly was wearing a police uniform.

9. I thought that my ex-wife had called the police and made a false accusation, so I called my lawyer in my divorce case and asked him if I had to respond to this intrusion.

10. He informed me that I had a right not to respond, though he did suggest that I might want to find out what they wanted.

11. I have subsequently learned that Defendant Kelly entered my home first.

12. To get to the side door of the garage he had to unlatch a closed side-yard gate and open it. He then entered my house by opening the side door to my garage.

13. I subsequently learned that defendant Kelly reemerged from my home, and a short time later defendant Ekeland appeared.

14. The two defendants then both entered the main living area of my home, passing through the side-yard gate, the side door of the garage, and then through the closed, but unlocked, door from the garage into the main living area.

15. They quietly moved around the first floor of the house for a few minutes.

16. Tracy Trotman and I were upstairs in Ms. Trotman's room.

17. The defendants then came up the stairs, and at no time did they announce themselves as police or state their intentions. They went up the stairs with their guns drawn, moving silently, using flashlights to help them see, ultimately pointing their guns at me.

18. Ms. Trotman first confronted them, and only then did they announce themselves as Oceanside Police, but even at that point they did not state their purpose. Ms. Trotman asked them what they were doing in our house, and, instead of answering, they demanded that Ms. Trotman identify herself.

19. There was nothing unusual about my house: there were no broken or open windows, there was nothing to indicate any crime was being committed or that anyone needed assistance. There was no loud music or other noise,

there were no screams or moans coming out of the house either

20. Defendant Kelly, in explaining the need to enter my house, explained that on other "check the welfare" calls, he's "found dead bodies in the bathtub."

21. The defendants explained that they did not know why Ms. Trotman's Father had tried to reach her, however defendant Kelly explained to Ms. Trotman that "apparently he couldn't get a hold of you."

I swear under penalty of perjury that the foregoing is true and correct based on personal knowledge.

Date: 4-10-02

/s/ Mark Martin
Mark Martin, Declarant

James E. Dunn – State Bar Number 188040
Attorney at Law
110 West C Street, Suite 2108
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Telephone: 619-234-5778

Attorney for Mark Martin

UNITED STATES DISTRICT COURT

FOR SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN, Plaintiff, vs. CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, AND DOES 1-10, Defendants.	Case. No. 00cv1932-B(NLS) NOTICE OF LODGEMENT OF COPY OF VIDEO OF INCIDENT, DECEMBER 28, 1999 (Filed May 13 2002)

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

Plaintiff Mark Martin has lodged a copy of the VIDEO OF INCIDENT, DECEMBER 28, 1999 with the Clerk of the Court.

Date: 5/13/02

/s/ James E. Dunn
James E. Dunn, Attorney for
Plaintiff Mark Martin

TRANSCRIPT OF VIDEO TAPE OF DATED DECEMBER 28, 1999 – OPD ENTERING HOME OF MARTIN WITHOUT WARRANT

Mark Martin (to Trotman, roommate): Are they in the house?

Trotman: yes

Martin (to Atty. Richard Ring's receptionist): Yeah, Mr. Ring, please. Well,. O.K. the police are breaking into my house. This is Mark Martin.

Tracy Trotman: (unintelligible whispers)

Martin: What?

Trotman: (more whispering)

Martin: (on phone) Well, they just broke into my house.

Trotman: I don't have my gun up here either.

Martin: (on phone) Hello? Yeah. hi, they're in my house. That's a little step beyond, I didn't let them in. Would you please? Can you tell him now? Well he wasn't, ok, alright, well ok. if I get shot dead I've got my camcorder and roommate here. I have no gun and I'm not threatening anybody. I don't know what this is about, but I thought we had laws in this country against this kind of thing. I've done that before many years ago. k, ok, ok, I tried. He told me to call him back is the problem because I consider the police coming into my house a problem. I'll try him again later. Thank you. Your name? Your name? Ok, is there anybody else there . . . (unintelligible)?

Martin: (to Trotman) Go down there and see what they want.

Tracy: Ok.

Martin: I'm going to be on the phone to my attorney if these guys are going to be shooting me.

Trotman: (whispering) I just don't want anyone to get shot.

Martin: Come on, hurry up, . . . (unintelligible).

(Trotman opens her bedroom door)

Oceanside Police Department Officer (OPD): Oceanside Police, don't even move.

Martin: (on phone) Ok the police are here.

OPD: (unintelligible)

Trotman: Yeah, I do.

OPD: (unintelligible)

Trotman: Yeah, but you've just broken in, do you have a warrant?

OPD: Miss, what is your name?

Martin: I'm going to leave the phone off the hook, you can hang up if you want.

Trotman: Do you have a warrant?

OPD: What is your name, miss?

Trotman: Do you have a warrant?

OPD: (yelling) What is your name!

Trotman: Do you have a warrant?

Martin: (walking out of bedroom) Hello, Hello!

OPD: (to Trotman) What is your name!

Martin: It's my house, my hands are in the air. What's the problem? What are you guys doing here for?

OPD: We got a phone call from a lady's husband or her father.

OPD 2: Check the welfare

OPD: Check the welfare

Martin: What?

OPD: We called multiple times.

Martin: What?

OPD: (unintelligible)

Martin: Thus [sic] is my house.

OPD: (unintelligible) what your name is?

Trotman: God . . .

Martin: No, just tell them what it is.

Trotman: It's Trotman

OPD: You got some ID?

OPD: Will you show us ID?

OPD: You're the lady we're looking for, ma'am.

Trotman: Oh, Oh . . . Um yea.

Martin: (to Trotman) Do whatever they say.

OPD: Do you have some personal ID? What hold on.

Martin: You can come in (to Trotman's bedroom) if you like, My hands are right up in, the air. I have no guns in the house. She has no guns. This lady's an MBA. She's very intelligent.

OPD: Put your ID over here, miss.

Trotman: Well, I'm not going to give you my ID.

Martin: Just give them the ID! Gosh, what are you an idiot!? Give them the ID.

Trotman: Well . . .

Martin: That man's got a gun on you!

OPD: You're the lady we're supposed to be checking on, OR? (unintelligible)

OPD 2: Ms. Trotman, I know for a fact I banged on that door repeatedly, I rang the doorbell until it was burned out. Why didn't you answer?

Martin: May I turn on the light?

OPD: Yea, go ahead.

Martin: You gotta flip if [sic] up over there. May, may I tell you why we didn't answer?

OPD: Yea, go ahead.

Martin: My attorney's on the phone line right now. I have an ex-wife who's a crazy witch. This is exactly the kind of stuff she has done to me in the past, We're sitting up here. I don't want to go to jail. I don't know what you guys are banging on the thing for. I've got everything can [sic] tape with my ex-wife. That's no problem.

OPD: I announced myself We announced ourselves.

Martin: Sir, I have been to jail over my ex-wife. I know for a fact. . . .

OPD: I announced myself, We announced ourselves, Why didn't you answer?

Trotman: (unintelligible)

Martin: I don't, I, I thought you were after me.

OPD: Let's go downstairs.

Martin: May I go in there and turn off my . . .

OPD: Sure

(unintelligible)

Martin: My blue Truck? Yes. (unintelligible)

Martin: (back on phone to receptionist) Hello? Yea, it's a big misunderstanding. They've got guns drawn in my house: I'll call him back later when I find out what the story is. It looks like we're getting it cleared up. It has something to do with my roommate, possibly, not me. Boy! Bye. Bye,

(Downstairs at during [sic] room table)

OPD: (unintelligible) . . . and the watch commander . . .

Trotman: This is . . . (nervously laughing)

Martin: What, what is going on?

Trotman: I don't know . . .

Martin: I'm serious, what is going on?

OPD: OK We got a call from your father . . .

Martin: I've got to have some water, guys.

Trotman: Yeah.

OPD: . . . through the watch commander's office, they called directly to the watch commander's office. They said that message with dispatch that we were supposed to go out here for a welfare check. This officer first arrived. He did a perimeter check of the residence.

Trotman: Right . . .

OPD: He determined . . . your . . . side . . . door was open.

Trotman: Yea . . .

OPD: Talked to the neighbors. Apparently, you guys were gone.

Trotman: Yeah.

OPD: Night out.

Trotman: Only a movie, no big deal.

OPD Radio: . . . maker's office, Ronald

Trotman, the father. (BPD. Who's Ronald?

Trotman: Ronald'.' He's, he's my dad, lie [sic] lives in Portland, Ok.

OPD 2: (to dispatcher) ten-four,

Martin: (to Trotman) Your Dad said something's wrong with you?

OPD: He . . .

Trotman: I have no idea what's going on.

OPD: called, can we use your phone? Essentially, he called the watch commander . . . this officer checked the residence, there was no response, knocked on the door, talked to the neighbor's said you'd been gone.

Trotman: yeah . . .

OPD: Unhnm., he called me, as he went in the side door was open

Trotman: right.

OPD: checked . . . the, the center door, that door was open, he backed out, he called

Martin: You guys can do whatever you want. I just want to know what the story is.

OPD: We knocked, we knocked on the door and I'll, I'll let you talk to the officer who got the call from her father.

Martin: (exhales loudly, releasing tension)

Trotman: Why is he calling?

OPD: I heard you . . .

OPD: I don't know, I don't know, I'll find out.

Martin: Your dad calls the Oceanside Police Department and says something's wrong with you?

OPD: No, no, no. Check the welfare . . . apparently he can't get ahold of her.

Trotman: Oh . . .

OPD: And I had dispatch personally call here.

Trotman: I don't know what a check the welfare is? What is a check the welfare?

OPD: To make sure that everything is okay.

Trotman: Oh. . . .

OPD: That's why we're here.

Martin: And you guys, and you guys do this?

OPD: I found, I found bodies in bathrooms before.

Martin: You come in, into a house without a warrant because of that?

OPD: We're authorized to check the welfare.

OPD 2: (making phone call in background to someone at-OPD)

Trotman: I don't know what it is.

OPD: Is this your current address, ma'am?

Martin: Seriously, I've got to ask you something. Do you, Do you . . . I mean if I wanted to do this as a prank to my ex-wife-and her husband and I said check the welfare on my ex-wife, would you go in there with guns on them?

OPD: Sir, we banged on the door

OPD 2: and we find two people in there . . .

Martin: I know you did.

OPD: . . . we don't know who they are 'til we verify.

Martin: Ok, I understand

OPD: So you could have solved this by . . . we went "Oceanside Police, Oceanside Police"

Martin: What if we were listening to Walkmans up there? Seriously.

OPD: . . . and I pushed the door repeatedly, and I banged on the door and all that . . . but that wasn't the case. You said you thought it was a prank from your ex-wife

Martin: No, not a prank, believe toe [sic], I've gone to jail. It's not a prank.

Trotman: It's not a prank.

OPD: Is this your address, ma'am?

Trotman: Uh, no, it's not.

OPD: What's your current address, ma'am?

Trotman: It's 2818 Roosevelt.

OPD I'm sorry?

Trotman: 2818 Roosevelt.

OPD: Roosevelt

Trotman: Yes. PMB It's R-o-o-s-e-v-e-I-t [sic].

Martin: I mean I called my attorney and everything. . . .

OPD: Ros- and what?

Trotman: e-v-e-l-t, like President Roosevelt and then street.

OPD: Oh, Roosevelt. Oh, OK. I got it.

Trotman: PMB 141

OPD: What's PMB?

Trotman: It's Personal Mail Box. It's government.

OPD: No, 2818 is what? To government, uh?

Trotman: It's Carlsbad.

Martin: Jesus.

End of Video Tape.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MARK MARTIN, Plaintiff,	)	
vs.	)	Case No.
CITY OF OCEANSIDE, SHAWN KELLY, BENJAMIN EKELAND, and DOES 1-10, Defendants.	)	00cv1932-B(NLS)

DEPOSITION OF SHAWN KELLY

Oceanside, California
January 10, 2002

Pages 1 through 190, inclusive

(Filed May 21, 2002)

Reported by Beth A. Ballerini, RPR, CSR
Certificate No. 7358

[2] The deposition of SHAWN KELLY was taken pursuant to Notice at the Office of the City Attorney, 300 North Coast Highway, Oceanside, California, on Thursday, January 10, 2002, commencing at 10:27 a.m., before Beth A. Ballerini, RPR, CSR No. 7358, a Certified Shorthand Reporter in and for the State of California.

APPEARANCES

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Also Present:

Mark Martin

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EXHIBITS

(All exhibits are photocopies
unless otherwise noted.)

EXHIBIT		PAGE
1	Oceanside Police Department Officer's Daily Log, 2 pages	136

[4] OCEANSIDE, CALIFORNIA;
THURSDAY, JANUARY 10, 2002

10:27 A.M.

SHAWN KELLY,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. DUNN:

Q. Good morning.

A. Good morning, sir.

Q. Would you state and spell your name for the record.

A. Shawn Kelly. S-h-a-w-n K-e-l-l-y.

Q. And, Mr. Kelly, have you had your deposition taken before?

A. Yes.

Q. So you know what a deposition is?

A. Yes.

Q. You understand that it's testimony that's just the same as if you were giving it in court and you're now

under oath and it's no different than if you were testifying in front of a judge and jury?

A. Yes.

Q. And have you had a chance to talk about this deposition with your attorney?

* * *

[164] Q. And how long does it take to do that?

A. Depends on how long it takes to find a judge or district attorney.

Q. Well, if it's during the daytime.

A. I don't know, sir.

Q. Have you ever done it?

A. Not to my knowledge.

Q. But you're trained in that procedure?

A. Yes, sir.

Q. And the purpose of that procedure is to get a search warrant rapidly; isn't that true?

A. Yes.

Q. Did you consider using that procedure before you entered Mr. Martin's house?

A. No.

Q. Why not?

A. I was there on a check the welfare. Based on the totality of the situation, I decided to go in at that time.

Q. Actually weren't you speculating about what you might find in there?

A. Don't know what to expect to find in there.

Q. So you didn't know what to expect.

A. It could have been anything.

Q. It could have been anything.

[165] A. Could have been a murder, a suicide. You don't know.

Q. And it could have been two people just not wanting to answer the door too?

A. Possibly.

Q. Now, have you ever had that situation happen on a check the welfare before where you went into the home or whatever and the people just didn't want to answer?

A. I remember going on some type of check the welfare down in San Diego and having a woman come out of a closet at me once. She was –it was a domestic situation.

Q. And what was the result of that?

A. Turned out just to be a domestic argument.

Q. So did anybody get arrested?

A. Not to my recollection. Actually, it was a cabinet that she came out. Excuse me, let me rephrase that.

Q. And what led you to enter the home in that case?

A. I believe it was a male and female arguing or screaming.

Q. And could you hear screaming and yelling when you were outside?

A. No.

* * *

[183] MS. WELLS: Probably. But I know DMB for sure is.

MR. DUNN: Well –

MS. WELLS: I mean to tell you the truth, there's a lot of people that aren't enamored with police officers, and that's why they have all these confidentialities.

MR. DUNN: No. My brother-in-law is a cop. I just – I have to make sure that I am able to provide through my investigation an adequate investigation.

So you know what, what we'll do is if there's an issue with that, I'll submit an interrogatory –

MS. WELLS: Okay.

MR. DUNN: – to get that information.

MS. WELLS: Okay.

BY MR. DUNN:

Q. Let's see. Just again, what training did you receive in the process of securing a telephonic warrant?

A. Assigned to training officers, actually gave a class on it to the briefing staff, which is the officers who are about to begin their shift.

Q. And when was that?

A. Five, six years ago maybe.

Q. And what can you remember about that, about the class?

[184] A. The class I gave?

Q. Oh, you gave it?

A. Yes.

Q. Oh, you gave a class on a telephonic –

A. I gave a training class on that to the briefing.

Q. Yeah, what can you remember about that?

A. If you go to a situation – give you an example, and you want to obtain possible evidence inside a house, you can get a telephone warrant. You have to go through a DA and judge, and you leave an evidence form bag at the house for everything you remove from the house, and you explain the details in your actual affidavit. And the judge and the DA, you'll all be on a conference line and the judge will either say yea or nay.

Q. Did you say you used an example of a certain situation?

A. Yes.

Q. And what was that example?

A. I don't recall.

Q. I mean – and how is it that you came to give that training?

A. I don't know. This was five, six years ago. I have no idea.

* * *

[187] A. They had a lot of new officers.

Q. H ve you yourself now served as a field training officer?

A. No. I've trained some subjects for a couple of days. Other than that, no.

Q. On any particular subjects?

A. A variety.

Q. Were they just kind of riding along with you?

A. No.

Q. Well, how does that work?

A. I would question them about everything I could about police practices.

MR. DUNN: Well, I think that's it. Anything that you'd like to add?

MS. WELLS: No.

MR. DUNN: Well, thank you very much, Officer.

THE REPORTER: Stipulations on the record?

MR. DUNN: Yes. We stipulate that she can be relieved of her duty; that the original will be sent to you; that Officer Kelly will have 30 days to review the transcript and verify that it's accurate and make any interlineations that you need to. And if the original is lost or destroyed, a certified copy can be used in [188] its stead.

MS. WELLS: So stipulated.

(Proceedings concluded at 3:45 p.m.)

--oOo--

[189] DECLARATION UNDER PENALTY OF PERJURY

I, SHAWN KELLY, hereby declare under penalty of perjury that I have read the foregoing deposition and that the testimony contained therein is a true and correct transcription of my testimony given at said time and place.

Dated this _____ day of _____ 2002, at _____, _____.

_____
SHAWN KELLY

[190] REPORTER'S CERTIFICATE

I, Beth A. Ballerini, Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the witness in the foregoing deposition was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth in the foregoing cause; that the deposition was then taken before me at the time and place therein named; that said deposition was reported by me in shorthand and later transcribed under my direction, and the preceding pages contain a true record of the testimony of the witness; and I do further certify that I am a disinterested person and am in no way interested in the outcome of said action, or connected with or related to any of the parties in said action, or to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of January 2002.

/s/ B. Ballerini
Beth A. Ballerini, RPR, CSR
Certificate No.7358